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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 141.

EAST CENTRAL EUREKA MINING COMPANY ET AL.

vs.

CENTRAL EUREKA MINING COMPANY.

REPLY TO SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR.

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Reply to Supplemental Brief for Plaintiffs in Error.

I.

Plaintiffs in error, at pages 4 and 5 of their supplemental brief, enter upon an analysis of section 2 of the act of May 10, 1872, and for that purpose divide it into four "sentences." The third "sentence" is the one from which the conclusion relied upon is drawn. It reads:

"No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing at the passage of this act shall render such limitation necessary."

The contention based on this sentence is thus stated:

"The third sentence establishes the width of all claims, as we shall contend, whether located before or after the passage of the act, as is evident from the exception the sentence con-

tains, 'where adverse rights *existing at the passage of this act* shall render such limitation necessary.' The wording of this exception conclusively shows that the sentence refers to both classes of locations."

We presume that by "both classes of locations" to which counsel thus refers is meant those lode claims made under the act of 1866 (which were alone in existence on May 10, 1872) and those which should thereafter be made or located under the act of 1872.

Undoubtedly, adverse rights existing at the passage of this act, founded on the act of 1866, would and did after 1872 stand in the way of the prohibition against limiting the surface of claims to be thereafter located "to less than 25 feet on each side of the middle of the vein." But so also did, and do, adverse rights under the act of 1870 (the placer act), under the Spanish and Mexican grants in California, Arizona, and New Mexico, many of which are in the mining regions of those States and Territories, and so also do adverse rights under the agricultural laws (homestead, desert land, etc.). In other words, whenever the vein discovered after the passage of the act of 1872 lay along a tract of land segregated as a lode location under the act of 1866, and so near to its boundary that less than 25 feet separated the center of the vein from the line of the segregated location, "the adverse rights" existed, which the statute declares shall excuse a location having less than 25 feet in width. As before remarked, the result would be exactly the same had the too-near "adverse rights" been the line of a placer claim, of a Spanish grant, or a homestead or desert land claim.

It is plain to be seen that where the *obstacle* is a location under the act of 1866, it stands supreme as against the quoted requirement of the act of 1872, and that that act intended that it should.

We submit, therefore, that there is no merit in the contention founded on this so-called "third sentence" in the second section of the act of 1872 which seeks to couple this

saving clause as to a few feet of surface ground with that "fourth sentence" which, relating to end lines, involves the chief value of the mines. An excusatory clause on so small a matter is not foundation enough on which to carry backward so heavy a load of disaster as would be the imposition of the end line theory of the act of 1872 upon the properties acquired under the act of 1866 and the preceding local rules and regulations.

The aid invoked by the plaintiff in error (supplemental brief, p. 6), to their theory of the alleged section of the act of 1872, is not strengthened by *Lakin vs. Roberts*, 54 Fed., 461.

The quotation from the opinion in that case is thus made by counsel:—

"It is not contended that plaintiffs interests were so far vested that by that act Congress had no power to limit or vary them. We shall assume, therefore, that Congress had this power, and having it, we think it exercised it in the provisions we have quoted."

The inference drawn by the plaintiff in error from this paragraph taken from a case in which surface ground and surface rights alone were in controversy, is, that since in that case the learned justice delivering the opinion of the Circuit Court of Appeals held that no more than 300 feet of surface ground on each side of the vein could be lawfully included in a patent issued after May 10, 1872, though on a location made under the act of 1866, that therefore the holding must be that since the surface quantity of the act of 1872 may be applied to locations previously made, the end line provisions must follow and be applied.

The learned justice seems to have surmised that some such view might possibly occur to counsel as deducible from his position as expressed in the above quoted paragraph and was at pains to preclude any such view. Immediately after the

paragraph of Mr. Justice McKenna's opinion quoted above there follows the words:

"The language of the section of the Revised Statutes must be confined to preserving the application and of all righ except the size of the claim—length and width of it. A the provisions of the statute would not otherwise be give effect."

Congress, in passing the act of May 10, 1872, was declaring in exact words that mining caims *theretofore* located should, as to their *length* along the vein or lode, still continue to be governed by the "customs, regulations, and laws in force at the date of their location."

No specific grant of *surface* ground was made by the act of 1866. Under that act the claimant was required to file a diagram of his claim or of his "tract" "so extended laterally or otherwise as to conform to the local laws, customs, and rules of miners." Length along the vein or lode was provided for, but nothing was enacted as to end lines. Hence the claim as located under the act of 1866 was continued by the act of 1872, for the 9th section of the later act expressly declares that the repeal of sections 1, 2, 3, 4, and 6 of the act of 1866 *"shall not affect existing rights,"* and that "applications for patents for mining claims now pending (May 10, 1872) may be prosecuted to a final decision in the General Land Office."

That the act of 1872 did not intend that any of its provisions should apply to or be enforced as to lodes or veins theretofore located under the act of 1866 is clear from the concluding section of the act of 1872, as follows:

"SEC. 16. That all acts and parts of acts inconsistent herewith are hereby repealed: *Provided,* That nothing contained in this act shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws."

Within 30 days after the passage of the act of May 10, 1872, to wit, on June 10, 1872, the Land Department issued

its instructions under the act of 1872, declaring therein, in paragraph 2, that—

"the status of lode claims located previous to the date thereof is not changed with regard to their extent along the lode or width of surface, such claims being restricted and governed both as to their lateral and linear extent, by the State, territorial or local laws, customs or regulations which were in force in the respective districts at the date of such locations, in so far as the same did not conflict with the limitations fixed by the mining statute of July 26, 1866."

Said circular, under the caption "Manner of locating claims or veins or lodes after the passage of the act of May 10, 1872," distinctly points it out that "from and after date of said act" no location can be made which—

1st. Exceeds 1,500 feet along the course of the vein.

2d. Which exceeds 300 feet on each side of the middle of the vein of the surface; and

3d. That the "end lines of such claims to be in all cases parallel to each other."

The eleventh paragraph of said regulations is as follows:

"Eleventh. By the foregoing it will be perceived that no lode claim located after the date of said act can exceed a parallelogram fifteen hundred feet in length by six hundred feet in width, but whether surface ground of that width can be taken depends upon the local regulations or State or territorial laws in force in the several mining districts; and that no such local regulations or State or territorial laws shall limit a vein or lode claim to less than fifteen hundred feet along the course thereof, whether the location is made by one or more persons, nor can surface rights be limited to less than fifty feet in width, unless adverse claims existing on the tenth day of May, 1872, render such lateral limitation necessary."

See Copp's Mining Decisions, pp. 275, 277.

These regulations are reproduced and re-established by paragraphs 2, 3, 4, 5, and 6 of the Official Mining Regula-

tions of the Land Department dated December 18, 1903, and now in force. (See, also, 28 L. D., pp. 594 and 595). They represent the mineral laws of the United States as they have been construed and administered by the Land Department for nearly thirty-five years, and as they are construed and administered today.

The contention of counsel that the "wording" of the "exception" to which they refer in the "third sentence" of the 2d section of the act of 1872 is diametrically opposed to this long official construction and administration of the law and is, we submit, utterly without merit or support in the statute itself.

Counsel for the plaintiffs in error repeat in their supplemental brief their former contention that the applicant for patent in the matter at bar had no vested rights under the act of 1866 which, so far as the United States was concerned, were not subject to defeat by the act of 1872, and this because payment for and entry of the land had not been made prior to the passage of the act of 1872, their reliance being primarily upon the *Yosemite Valley* case (15 Wall., 67), *Deffeback vs. Hawk* (115 U. S., 392), and *Davis vs. Wiebold* (139 U. S., 507, 517).

At page 3 of their original brief the other side maintained payment and entry to be the inception of any right of defendant in error, and cited *Davis vs. Wiebold*, 139 U. S., 239 (*sic*), 507, where they quote Mr. Justice Field as saying:

"According to *Deffenbach vs. Hock*, 115 U. S., 392, the patent to a mine relates back to the entry and payment of the price to the Government, and when the patent subsequently issued it took effect at the date of the entry, that being the earliest evidence of any movement for acquisition of any title from the Government."

We do not find in Davis *vs.* Wiebold (139 U. S., 507) nor in Deffeback *vs.* Hawk (115 U. S., 392) language which closely answers to the above paragraph as quoted, and are

quite sure that nothing is to be found in the Deffeback *vs.* Hawk case which sustains the point intended to be established by the quotation.

The paragraph in the Davis-Wiebold case referred to is found at page 517, where the court, expounding its decision in Deffeback *vs.* Hawk, said of the facts and proceedings *in that case:*

"Proceedings for the acquisition of the mining claim had been previously initiated, the entry of the same had been had, and payment of the price made to the Government; and when the patent subsequently issued it took effect by relation at the date of the entry, that being the earliest evidence of any movement for the acquisition of the title of the Government."

The *"earliest evidence"* to which the learned justice who delivered the opinion of the court in both of the cases cited referred had to do with the facts in the Deffeback case, not with a governing principle. In that case the mineral entry, the payment, antedated every claim of right set up by the town-site claimant. It was not necessary to set up any of the prior proceedings, nor were they set up. The governing principle was, however, declared in that case. In its concluding paragraph the court said (p. 530):

"In the several cases to which we have been referred in the fifth and sixth Montana Reports, *Silver Bow Mining Company vs. Clark,* 5 Montana, 378; *Talbott vs. King,* 6 Montana, 76; *Butte City Smoke-house Lode Cases,* 6 Montana, 397; which involved contests between parties claiming under mining patents and others claiming under town-site patents, and in which very able and learned opinions were given by the Supreme Court of the Territory of Montana, the mining claim patented had been located and the rights of the mining claimant had thus attached before the town-site patent was issued. The patent which subsequently followed was a mere perfection of the right originated by the location, and to which it took effect by relation. It was held, in accordance with this opinion, that the prior mining location was not affected by the town-site entry."

Turning now to the opinion in Deffeback *vs.* Hawk (155 U. S., 392-405), that part of it to which reference is had in Davis *vs.* Weibold is found at page 405, as follows:

"The complaint alleges, and the answer admits, that on the 20th of November, 1877, the plaintiff applied to the United States land office at Deadwood to enter the land as a placer mining claim, and that on the 31st of January, 1878, he did enter it as such paying the Government price therefor. No adverse claim was ever filed with the Register and Receiver of the local land office, and the entry was never canceled or disapproved by the officers of the Land Department at Washington. The right of the Government, therefore, passed to him; and though its deed, that is, its patent, was not issued to him until January 31, 1882, the certificate of purchase, which was given to him upon the entry, was, so far as the acquisition of title by any other party was concerned, equivalent to a patent. It was not until the 28th of July following that the probate judge entered the town site. The land had then ceased to be the subject of sale by the Government. It was no longer its property; it held the legal title only in trust for the holder of the certificate. Witherspoon *vs.* Duncan, 4 Wall., 210, 218. When the patent was subsequently issued, it related back to the inception of the right of the patentee."

The reference to Witherspoon *vs.* Duncan in that connection and the concluding clause, "*When the patent was subsequently issued, it related back to the inception of the right of the patentee,*" constitutes the strongest possible announcement or reiteration of the long-settled doctrine that the earliest act done in conformity to law for the acquisition of public land is the inception of title to which the patent when issued relates back.

To contend that a valid location made and maintained in accordance with the mineral laws of the United States, and the local customs and regulations, may be impaired, defeated, or destroyed before payment for and entry of the

land is utterly inconsistent with the rulings of this Honorable Court in

Noyes *vs.* Mantle, 127 U. S., 348.
Dahl *vs.* Raunheim, 132 *id.*, 262.
Forbes *vs.* Gracey, 94 *id.*, 762.

In conclusion, it may be added that there can be no question but that, in framing the act of 1872, the greatest care was taken to avoid even the appearance on the part of the United States of an intention to in anywise lessen, affect, or diminish the rights then held under locations at that time in existence.

Respectfully submitted,

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